Introduction - Treaty Rights and the Net Investment Income Tax Appeal

In March 2026, the **United States Court of Appeals for the Federal Circuit** heard two pivotal cases, **Bruyea** and **Christensen**, regarding whether Americans living abroad can use **foreign tax credits** to offset the 3.8% **Net Investment Income Tax (NIIT)**. While the Internal Revenue Code does not explicitly allow these credits for the NIIT, the lawsuits argue that **bilateral tax treaties** with Canada and France should override domestic law to prevent **double taxation**. The central legal dispute involves whether treaty language requiring the U.S. to follow its own tax limitations allows the government to **completely deny** credits or simply governs the method of calculation. Observers noted that the **judges appeared skeptical** of the government's position, though the complexity of the issue suggests a potentially narrow or **split decision**. A victory for the taxpayers would establish a significant precedent, asserting that **treaty obligations** to eliminate double taxation must be honored even when domestic statutes are silent. Should the government lose, the case may ultimately reach the **Supreme Court**, carrying broad implications for how the U.S. taxes its citizens globally.

What are the core arguments in the Bruyea and Christensen cases?
How could these rulings impact US citizens living abroad globally?
Why do the speakers compare the investment tax to a tariff?

Discussion Between John Richardson and Tim Smyth about the Bruya and Christensen cases

This transcript captures a debriefing between two advocates regarding a pivotal **U.S. Court of Appeals** hearing that addresses whether Americans living abroad can use **foreign tax credits** to offset the **Net Investment Income Tax (NIIT)**. The discussion explores a critical legal conflict between the *Bruyea* and *Christensen* cases, centering on whether **bilateral tax treaties** with Canada and France can override domestic tax codes to prevent **double taxation** on investment income. The participants analyze the government’s argument that it maintains the right to deny these credits by strategically placing the NIIT outside of standard income tax chapters, a move the speakers characterize as a **punitive tariff on foreign investments**. Ultimately, the text highlights the broader constitutional and

diplomatic implications of these rulings, emphasizing that the court's decision could fundamentally redefine the **financial rights of U.S. citizens** residing overseas.

Speaker A:
Okay. Let's get started here. Can you hear me, Tim? I can. Okay.
Excellent. So by way of background, this is John Richardson speaking with you from Toronto, Canada. Today is let's see. What would this be? This would be the 03/04/2026. And yesterday, a very, very important appeal was argued the United States of Appeals. And this had to the net investment income tax, specifically whether a foreign tax credit for the net investment income tax. And this is a rather complicated but very, important issue for Americans abroad. And just to give a little bit of background on this before we invite Tim into the conversation who was there yesterday, so a very interesting very interested to hear his report on all of this. Basically, there were 2 appeals heard back to back.
They both dealt with the same issue but in slightly different ways. The first was a case out of Canada, a man named the man by the name of Breo. The second was a case out of France, name is Christensen. And in both cases, the ultimate issue was whether The United States could impose essentially double taxation on the net investment income tax which would be a 3.8% tax on well, net investment income. So specifically interest, dividends, and capital gains.
And or whether a foreign tax credit would be allowed to the extent that that investment income was foreign source. And what's interesting about it is that it is a treaty issue. And the reason it's a treaty issue that is because under the internal revenue code, because the net investment income tax is found in chapter 2 a and the normal income tax rules are found in chapter 1 and the foreign tax credit rules are found in chapter 1. Under the internal revenue code, a foreign tax credit based on foreign net investment income would not be allowed. But okay, that's the starting point.
The question is though, would it be allowed under a tax treaty? In other words, can a US tax treaty create a claim or right to the use of a foreign tax credit when the Internal Revenue Code does not allow that. And the basic issue which is common to all of these is really in the language, the language of the American tax treaties, which is more or less the same in all of them, but I think it's important to read this in. All these tax treaties have an elimination of double taxation article, and this is Canada's. It says in the case of The United States, subject to provisions of paragraphs 4, 5, and 6, let's ignore that.
Double taxation shall be avoided as follows, in accordance with the provisions and subject to the limitations of the law of The United States as it may be amended from time to time without changing the general principle hereof, The United States shall allow a citizen or

resident of The United States, basically the tax credit. So let's read that again. In the case of The United States, subject to the provisions of paragraphs 4, 5, and 6, which are not at least for the moment applicable. Here we go. Double taxation shall be avoided as follows. In accordance with the provisions and subject to limitations of the law of The United States, as it may be amended from time to time without changing the general principle hereof, presumably the general principle being avoiding double taxation, The United States shall allow a citizen or resident of The United States a credit. Now a moment ago, I noted that under the internal revenue code, the tax law of The United States, a foreign tax credit is not allowed. So the first question here is, if in a situation where under the domestic law of The United States, a foreign tax credit is not allowed, does that meet, okay, the definition, if you will, of in accordance with the provisions and subject to the limitations of the law of The United States? Or does that provision mean something else? For example, yes, you get the foreign tax credit but the laws of The United States determine the way that credit is calculated.

So this is a huge, huge issue. And the Bareo case, which was on appeal, in the court of first instance, that court held that in fact the language in accordance with the provisions and subject to limitations of the law of The United States could not be used to completely deny a foreign tax credit. Rather, it should be interpreted to focus on the way that the tax credit is calculated. So mister Breo won won his case and won on the basis that, in fact, the Canada US tax treaty did require The United States to offer him the foreign tax credit. Why? Because even though the credit was not available under The US domestic law, the way to interpret the language in accordance with the provisions and sovereignty of the limitations of the law of The United States, the way to interpret that is how the tax credit is calculated, not whether the tax credit is calculated. So that was the basis for the Breo appeal. But moving on to Christiansen and The US France tax treaty includes a very similar provision. In accordance with the provision and subject to limitations of the law of The United States as it may be amended from time to time without changing the principle The United States shall allow a citizen or resident a credit using the French income tax. So that's that's very very similar.

In Christensen the Court of First Instance held that the language in accordance with the law of The United States would result in the denial of the foreign tax credit under that particular article. So here we have a conflict between the courts in Breaux and the court in Christensen. Ultimately the taxpayers won in Christensen though because of an additional provision in The US tax, in The US Canada, sorry, France tax treaty that was held to effectively create a separate a treaty based foreign tax credit that operated outside outside the initial provision that I just read to you. And that is basically what the basis of the Christiansen appeal was. Now what was interesting to me is the court heard them back to back and heard Breo first.

And that makes an awful lot of sense because remember in Breo, the issue is whether the language in accordance with the provisions of The United States law would allow The United States to simply deny a foreign tax credit period. And of course, if Brea were to succeed on that, then the Christianson issue would basically become moot because under all of these tax treaties, essentially, a tax a foreign tax credit could be used to offset tax on the net investment income tax. So that's the basic background to this. I listened to the recording of the hearing. I thought it was very interesting, but I'm joined today by Tim Smith who actually was, I believe, in the in the courtroom yesterday.
And so I'm sure we'll have some insights into this that would not have been properly captured by the recordings, etcetera. So welcome, Tim. How are you today? Doing well. Okay.
May I ask you, are you satisfied with my general sort of teeing this up in terms of the summary of the issues, or is there anything that you think should be
Speaker B:
added From your
Speaker A:
your
Speaker B:
Yeah. I think it it's a pretty good summary. As you said, they they heard the cases back to back. I thought it was interesting just in terms of and I don't know if you you can hear this in the audio, but I think the the justice has mentioned. So this is this is the US Court of Appeals for the Federal Circuit.
So this is actually a specialized appeals court with nationwide jurisdiction. And it has appeals from, the US Court of International Trade, which is kinda like the tax court, but for customs matters. I I'm bringing that up because this this was 1 of the appeals courts that held that, decided the tariffs case that I think people are broadly aware of the v VOS electors versus Trump that that came through this this appeals court. It also hears appeals from the the court of federal claims, which is another specialized district court. Generally, tax cases, kind of go through 1 of 2 avenues.
They either go through the US tax court and then, which is not a, which is not a article 3 court, tax court judges is justice judges actually semi work for the IRS. But it either goes to the tax court. And the case that goes to the tax court are cases where you're challenging a tax law prior to actually paying the tax owed. So that's 1 route. The other route that tax cases end up is where people pay a tax that they believe they do not owe and then want a refund.
And then they they file for a refund through the court of federal claims, which
Speaker A:
Okay. Well, in any event, the this is the court that clearly has a jurisdiction to

Speaker B:
It does.
Speaker A:
To reverse any of these decisions. And I might say that I was actually impressed with the quality of the judges, at least from what I could hear. What was your view of that?
Speaker B:
I would agree with you. Although, I think, actually, to be they were quite honest and open that they do not carry a lot of tax cases, that they acknowledge that these are very complex issues even for them to decide. I think there was 1, justice judge judge Hughes who made a comment, towards the end asking and Christian, since lawyers, have have there been any other appeals courts that have had to deal with these specific issues? And the the lawyer, I forget his name, but he the lawyer for the tax base, basically, says no. And judge Hughes kind kind of laughs and says, well, lucky us.
Speaker A:
Well, I, you know, I was impressed with their grasp of the issues, to be honest. You know, this stuff, where they're absolutely right is that this stuff is is not easy at all. Okay. So, you know, also if you were to listen to the oral argument with Breo first and Christiansen second, it's almost as though they separated them. You know, they sort of follow the same line of reasoning that I did, namely that if in fact the basic terms of the treaty do not allow The United States to simply deny a treaty, do not a a tax credit.
Okay? Then that would really make the issue in Christensen mood mood, wouldn't it? Yes. Okay. So to recap here, it's very easy to look at Christensen and Breo and say, well, you know, these are the same cases because both of them were cases where a court ruled that a, you know, a US citizen abroad could use tax paid on foreign source investment income as a credit against the net investment income tax.
But in reality, these are very, very different legal issues, aren't they?
Speaker B:
Yes. Although I I do wanna hold out a a caveat. I think there is a possibility of of the court ruling against the, taxpayer in in Breyer and ruling for the taxpayer in Christensen. Because in Christensen, you have this other provision of the treaty.
Speaker A:
Yeah. Yeah. Okay. Well, we'll get into that in a minute.
Speaker B:
Yeah.
Speaker A:
Yeah. I mean, I agree with you that that's possible. Actually, what I've learned over the years that anything is possible. Okay? Yeah.

But let's begin well, let's begin with the Breo appeal, which interestingly was about an hour. Okay? And the the the court did not wanna rehash the same issues in the actual appeal, right, of Christians, and they focused they focused on on other things. Okay. Well, what was it like to be in the room?
What did it look like? What was your impression of the lawyers? You know? Was anybody there? Were any was any of the litigants there?
I mean
Speaker B:
I don't believe mister Breyer? I don't believe either Breyer or Christians en were there. The courtroom was full, which surprised me. And I and, actually, afterwards, I I kinda realized, it was full because they they hear other cases. So so when these 2 cases were finished and argued, there were other lawyers waiting to to present their cases.
So I think that was most of, most of the people who were actually in the room were, attorneys for other
Speaker A:
For other cases.
Speaker B:
Other. Yes. Yes. Because there were only I believe there were probably there were 2 other lawy 1 lawyer and 1 someone who is an activist like you and me. And I'm not sure.
I couldn't get the person's name, but there there actually was someone else, kind of an activist person like yourself in the room, in the courtroom as well because I talked to him after the after the hearing was over. And there were several other government lawyers that were not part of the part of the deep who who who would work for the the government, IPV IRS counsel's office, but we're not actually arguing the case. So there may be 7 or 8 people who were in the room related to the case.
Speaker A:
Mhmm. Related to this particular case. You know, Tim, agree with me or disagree. The implications of this case are absolutely huge and go far beyond the the net investment income tax. Would you agree?
Speaker B:
They do.
Speaker A:
But with a Because yeah. I mean, to put it real simple. Okay? If the government can win on this and argue that that provision, according to the laws of The United States, allows them to deny a foreign tax credit, they could they could effectively and, the government lawyer was pressed on this. They could effectively simply deny, any foreign tax credit.
Would you agree?
Speaker B:

And yes. And they and they had they had there are several the judge judges had mentioned, well, congress could simply rewrite the internal revenue code. So income taxes are collected, under chapter 2
Speaker A:
or chapter 1. All they to do
Speaker B:
yeah. Yeah.
Speaker A:
All they have to do is move any tax provision outside of chapter 1. That's that's right.
Speaker B:
Yes.
Speaker A:
Send. And I think, you know, it seems to me, okay, that, I mean, first of all, you know, let's look at the the Rosenblum and and make us brief. Right? You know? And I think that I think that professor Rosenblum actually was involved in the creation of the Canada US tax treaty.
Okay. You know, directly. Okay. And, you know and by the way, when I say the Rosenblum brief, I include the the professor what the a the co author. Okay?
From Rutgers, I think. Anyway, they did they did a really interesting job and I think an excellent job. But I I think that, you know, part of the the theme of the Rosenblum brief was, come on, guys. Okay. I mean, obviously, you know, the treaty has to mean something. Right? And the title of the article is the elimination of double taxation. And it would seem to me that if The United States is allowed to interpret treaty article designed to prevent double taxation. If they're allowed to interpret that in a way to guarantee double taxation, that seems to me to be a, you know, a diff a difficult hurdle to clear. Would would you agree with that?
Yes. Yes. I mean, you know, because what what the government is effectively arguing it means is yeah. So we got, you know, article 24, this are article elimination, double taxation. You know, the other country has to give a tax credit for US paid, but The US is obligated to give a credit only if The US wants to give a credit.
Right? Yes. And that that really that seems to me to be the kind of interpretation that only a government lawyer could think up.
Speaker B:
Correct. Although with something I noticed very quickly was that the government lawyer acknowledged that, the treaty could a treaty per se, generically, could create a tax credit where a tax credit was not allowed under domestic law. And and they, you know, they acknowledged there was no treaty override in the in an NIIIT tax. A a treaty could do

anything, basically. But that actual So I checked of the treaty does not allow for that of this treaty.
So Well, she did acknowledge
Speaker A:
perhaps grudgingly that a treaty could create a foreign tax credit independently of the Internal Revenue Code. But it's not the same as the government denying a foreign tax credit based on their saying, well, we know that this is what the article said, but we think we're gonna deny it here so you can't have it. Right?
Speaker B:
Correct.
Speaker A:
I mean, those really those really are different issues. Well, no. I mean, I have
Speaker B:
She was arguing, like, if Canada wants the the the forward tax credit to cover the n n NIIT, then Canada can renegotiate the treaty and have specific language that would cover that. She actually said
Speaker A:
Okay. Okay. But now let's just hang on, man, on that. Okay? That might be true in a logical sense.
But let's remember that the treaty was last updated, and I think at the 2007 Yes. In Canada, US tech.
Speaker B:
Yes. Looks like you're muted, John. I can't hear you. I can't hear you. I think you're muted. I'm here. I'm back. Oh, you're back. Yeah.
Speaker A:
Investment income tax, it comes into force quite a quite a few years after the most recent tax treaty. Right?
Speaker B:
Yes.
Speaker A:
What, if any, is the significance of that in your view?
Speaker B:
Well, not really be not really anything because, generally, treaties, are considered to be more precedential over, statutes unless the statute actually has a provision that says the district government treaty.
Speaker A:
And Right. But is the claim is the claim of the government lawyer, can I can just renegotiate the treaty? Sort of from a practical and realistic perspective, is that really a credible claim?

Speaker B:
No. Yeah. I I agree.
Speaker A:
I think it's I think it's a ridiculous claim. Okay. What was your impression? So we've talked a little bit about the judges and, you know, and and based on what I could hear, I was I was actually impressed that, you know, they had as much of a handle on this as they did. Right?
Speaker B:
Yes.
Speaker A:
What was your impression of the lawyers?
Speaker B:
The lawyer for the taxpayers actually reminded me a little bit of you physically, just a little bit maybe a half a foot shorter.
Speaker A:
Half a what?
Speaker B:
Half a foot shorter than you.
Speaker A:
Okay. Alright.
Speaker B:
Looks like you kind of.
Speaker A:
Okay. That's interesting.
Speaker B:
Yeah. And then the the government lawyer was a older woman. I don't know much about her. There were 2 or 3 other government lawyers there too, I believe.
Speaker A:
Did you feel that I mean, clearly, the lawyer for the the tax payers, who I believe is based in London London, UK. I I mean, were his cases. Right? Right. So let me get both of them.
So I I would assume a very, very high degree of confidence, proficiency, and knowledge on these issues from him. That would be accurate?
Speaker B:
Yes.
Speaker A:
Yes. Lawyer. I mean, do you I mean, this stuff's really hard. Right? You know, hard to be thrown into this unless you got a certain expertise.
Do do you what was your view? Do you think that that she had a a really good handle on this? Or

Speaker B:
To be honest, better than I was expecting, but not that great. I felt, especially by the end of the arguments terms of the Christensen case, she felt like it felt like she was getting a bit overwhelmed.
Speaker A:
Well, you know, in relation to the Christiansen case so, you know, the so the way the Christian case Christian case was decided, judge judge blank, right, was that so there's there's 2 parts, right, to the elimination of double taxation clause of the France US tax treaty. The first part is the 1 that we've been focusing on. The second 1 is is is what's called sort of the 3 bite rule, which actually doesn't have anything to do with this case because the 3 bite rule has to do with resourcing US sourced investment income. Right? Not foreign source.
So it really has nothing to do with the issue. Judge Blank used the existence of the 3 bite rule, not the application of it, but the existence of it. It's their existence to argue and justify for an independent treaty based foreign tax credit. Right? You know, that was the way that that decision really unfolded.
And you've gotta read the decision, you know, a few times, and it's a long decision, I think, to get there. But listening to the government lawyer, you know, I had a couple of thoughts. The first was that I'm not entirely clear that she made that distinction on the 3 rule. Right? You know, I do you you agree with that.
Right? Yeah. I mean, it was sort of like I I don't think she understood that the 3 bite rule was not the issue. That the existence of the 3 bite rule was you know, gave judge Blank the jurisdiction, if you will, to argue for a more expansive and independent based foreign tax credit. Right?
But but what was really, really interesting and almost shocking was, do you remember the moment where she made the claim that to allow the foreign tax credit would essentially allow Americans abroad to double dip by both excluding income under the foreigner and income exclusion and claiming a foreign tax credit. Yes. Did you pick up on Yes.
Speaker B:
I did.
Speaker A:
So, what would be your comments on that interesting claim?
Speaker B:
I think the judges really didn't buy that or really not that interested in that. But before we're on income exclusion, it's a domestic and I'm not sure if she's really correct. Before we're on income exclusion, a domestic
Speaker A:

Well, it it I think the point is this, that you don't use the foreigner and income exclusion for investment income anyway. Right? You know, it's only used for, well, earned income. Right? Whatever that is, but earned income is not investment income.
So, you know, that claim and I believe that was in their other written material too, is is really outrageous because it, you know, reflects a fundamental dis misunderstanding of, you know, of the various components that the various components of US taxation that Americans abroad face. Right?
Speaker B:
Yes.
Speaker A:
So that was that was interesting. And, you know, of course you know, they didn't pick up on it. But I don't know. I you know, I was left with the impression, okay, listening to her respond to the questions from the judges. And I don't think she necessarily did a really, you know, a bad job.
But if you were to look at objectively what the basic approach was, it's do. Let's forget about that. Okay? You know, that really doesn't matter. Okay?
The purpose of the treaty doesn't matter. Let's just look at, you know, some specific language in the treaty. And, you know, what does it mean? And we're we're, you know, we're gonna take the most punitive interpretation of it even though, you know, it's very, very clear that it can be interpreted in different ways. And I don't think that she made any effort. And if she did, she had no success in explaining why that part of the treaty should be interpreted to completely disallow foreign tax credit as opposed to it being a computational thing determining how an existing foreign tax credit should be actually be calculated. Right? Yes. And she said at 1 point, well, you know, in the technical interpretation, there's no support for the view, you know, that The US can't simply deny the tax credit. Well, I don't think that there's any there's any support for any view of that 1 way or the other.
I don't know that I mean, I I believe I've read the technical interpretation, you know, once or twice. I don't remember it specifically, but I think I would have remembered if there had been something in the technical interpretation that would have supported the view altogether. Right? Yes. So what I mean, how did you sort of feel?
First of all, do you agree with me that the general approach of the government law but who cares what the treaty says? We just wanna look at some language or some very specific a very specific part of a section, and we wanna simply interpret in the way that's most advantageous to the government. You know, even in the background where where the, you know, Canada files an affidavit or evidence saying that, absolutely, we would've we would've given the foreign tax credit had it been the other way around. Right? No.

I think So then she also said that she said, well, that, you know, that's still reciprocity. Reciprocity a reciprocity and treaty is that Canada has to do something and The US doesn't. Correct. Would you call that reciprocity?
Speaker B:
And I think she was saying, well, the treaty isn't reciprocal.
Speaker A:
Okay. Well, now tell me more about that.
Speaker B:
Well, she said by just by definition, it can't be reciprocal. You know, she was she was making that claim, and she said this is basically, her argument is this is a a government to government issue, that it's Mr. Bourreyes needs to take this off with the Canadian government. And then the Canadian government can do the treaty process. Now to be clear, you know, I don't really think it's gonna be an issue in the decision.
Booyah actually did approach Revenue Canada at some point. They're called a competent authority process of dial. Like, he did he did approach Canada Revenue early on in this thing And and then withdraw withdrew that request and then filed filed suit in the in the court of federal claims. And the government lawyer brought that up. I'm not really sure that's super relevant, but I think she was trying to emphasize in the case of, the Bouillet case that this is you know, the issue is is what candidate has agreed to in the treaty, which I told the lawyer, the the the taxpayer lawyer.
You know? It's kind of amusing to hear that because I've, for years, heard Canadian government officials say if you're unhappy about The US tax system, go talk go talk to the Americans. And here we have the US government saying, well, go talk to the Canadians.
Speaker A:
Mhmm. I think that was Well, talk talk to the Canadians about what exactly?
Speaker B:
That they need to they need to have the treaty negotiated that includes the NIIT.
Speaker A:
I see. Okay. Yeah. I mean, that's that's frankly an outrageous claim, I mean, given the practical realities of that. Yeah.
I mean, look. Treaties always say that they're, you know, they're to apply to similar taxes, etcetera. Now 1 of the points that the court was all over right from the get go was that by the definition of the treaty, it is absolutely 100% the case. The the net the n I t the n I I t is an income tax under under the provisions of the treaty. There's no question about it.
No question about it. And, you know, it doesn't matter whether it's in chapter 2 a or anything. It's definitely an income tax on the meaning of the treaty. And The US is simply flat out denying the foreign tax credit. So let's say we look at the overall purpose of the treaty.

What would be your view? Do you think that allowing the foreign tax credit on part of The US side is cons not only consistent with the perverse of the treaty, but required by it? Yes.
Speaker B:
You mean it's not like The US if if if the court rules for Bouillet and Christiansen. It's not as if congress doesn't have options. If if congress is so so upstacked that this particular part of the income tax, can apply a foreign tax credit to. It could it could override the treaty. It could The US could be ask for renegotiation on on their side, which they have not either because there have been newer tax treaties that come into force after 2010 that don't have any type of carve out either.
So it's not like congress and the and the executive branch are, like, totally helpless either. They they have such such great objection to the foreign tax credit applying to this tax. And in fact
Speaker A:
I'm gonna make a statement here. Yeah. I'm interested in your view of this. You know, there's been all this discussion of of tariffs lately. Right?
And I think there's general agreement that the tariffs that the Trump administration is trying to impose were really a sales tax on foreign goods. Right?
Speaker B:
Yes.
Speaker A:
Now here's my statement. The way the internal revenue code is written, the net investment income is a tariff on foreign investments.
Speaker B:
Yes.
Speaker A:
Absolutely. Right? It's saying, look. You know, you you wanna invest in investment products that aren't US, you're gonna pay an extra 3.8%. Right?
Let's strike you as so, you know, this kind of punitive behavior in relation to things that are foreign, I mean, it's certainly not without precedent. We see this with the PFIC, passive foreign investment, the CFC rules, etcetera. How do you think The US feels about things that are foreign?
Speaker B:
I don't think it likes things that are foreign. I think this is a very protectionist administration. You mean, I I don't know if it you mean, I guess you could say this particular case had started under the under the previous administration, with Rui Yahair and Christensen that the initial the initial decision or whatever to to deny their refunds happened under the Biden administration.
Speaker A:

But but leaving aside when it started. Right? I mean, I think where everybody is in agreement and I've heard no argument to the contrary. Where everybody is in agreement is that under US domestic law, the Internal Revenue Code, no foreign tax credit is allowed against the net investment income tax. Right?
Yes. So I mean, without this and and if no foreign tax credit is allowed, then, you know, let's say you have a choice of, you know, investment income in The United States or investment income outside The United States, you can do either. But if you invest outside The United States into something that's foreign, then you're gonna pay an extra then then you're gonna pay not only the 3.8% US tax, but you're also gonna have to pay without relief any foreign taxes. Right?
Speaker B:
Yes.
Speaker A:
I mean, that sounds very much like a tariff to me.
Speaker B:
It does. And I thought that was what the the government attorney was like, well, every country in the world has a foreign tax credit as part of just generic domestic law, which is not has not always been true for 1 thing. You know, in the British system, foreign tax credits are relatively new and mentioned and and really only come around the time that Britain started to enter into tax treaties with countries. So so that is not true throughout history. And, again, you know, nothing stopped.
You know, nothing stops a a future for congress from, you know, simply raising the rate of chapter 2. I mean, the tax is already there. They can you know, instead of 3.8, they can raise it to 5, 6, or 7. And
Speaker A:
Well, they could they could also include a broader source of income, couldn't they?
Speaker B:
They could. They could.
Speaker A:
What if they so what if they decide to include employment income or certain kinds of employment income?
Speaker B:
Yes. In in her view as well, trust con Trust Congress will not do that.
Speaker A:
Do you believe that, Tim?
Speaker B:
No. And I'm not sure the judges believe that either.
Speaker A:

Do you think the lawyer believes that?
Speaker B:
Does the lawyer believe that? Maybe.
Speaker A:
You you think you think that years and years of being in government Yeah. He's gonna
Speaker B:
for the government for a long time. There's a lot of younger lawyers. They might come and work for the government for a few years, but then they go into private practice, and then they're you know, they never go back to the
Speaker A:
So, you know, this has really been a great conversation, lady, because I think that where this conversation has gone I mean, I think it I think we've done an interesting job in sort of expanding why this is so dangerous. Right? Yes. But, yeah, you know, it's gotten very little attention, very little attention.
Speaker B:
And I'll also point out that these these other taxes, these other chapters, the other countries allow foreign tax credits for it. So you could you could be a Canadian who has, you know, US sourced income that falls under the NII key, and you could get a a Canadian foreign tax credit. And and just to give an example, chapter 3. So there's chapter 1, chapter 2, chapter 3. Chapter 3, any Canadian should know because that's the that's the withholding.
The the nonresident alien withholding is under chapter 3. And Canada gets foreign tax credits for US source chapter 3 income all the time. So these other chapters are definitely part of the income tax, and other countries get foreign tax credits for them, you know, for people with US source income that falls under these other chunks. They do it all the time.
Speaker A:
What do you think what do you think the government lawyer's attitude was towards treaties in general?
Speaker B:
It was not quite as hostile as I thought, because I think they kind of admitted that the treaty could kinda do whatever it wanted. You know? They were just making a a textural argument as to the treaty. And, again, I'm not sure a I'm not sure if a valid I it an actual argument. They were not quite as hostile to the idea that the treaties could override statute law.
It's just they were arguing in this case that wasn't what the text of the treaty did. They may have decided at some point that that wasn't ground they could stand on reliably. Mhmm. I mean, that's that's the type of argument you would get from, like, a law of tax law academics. But that
Speaker A:

was Yeah.
Speaker B:
The argument you actually heard the government say.
Speaker A:
So so you were in the courtroom, and you could see what was going on. You could see the body language in that of the judges and and all that. Say, you know, you hadn't really heard very much, but you were just watching. What could you what, if anything, could you infer from, you know, the body language and that sort of thing? What do you how do you think the judge regard this?
Speaker B:
I think 2 of the judges, I think judge Chen judge Chen and judge Stock did not ask as many questions as judge Hughes. I think they were not their body language, I think, was not that favorable to the government. Judge Hughes, I think, was tough on both sides. I kinda know. I think the taxpayer lawyer, I'm not sure, was quite expecting judge Hughes to be quite as vigorous in his questioning.
But, you know, that's how some judges are. So I feel like judge Chen and Stock did not see you know, again, they they kind of ask maybe between the 2 of them, they ask, like, 40% of the questions, and judge huge aunt asked maybe 60%. But I did not get the feeling stock or chin with that. Mhmm. That, you know, enthused with with the government side.
I'll I'll note, in terms of, Chen Chen's background, this this particular appeals court does a lot of patent, claims. Judge Chen's background is actually in patent law. And I'm just looking at his biography as a he has a bachelor's degree in electrical engineering for
Speaker A:
Sorry. What?
Speaker B:
Judge Chin has a bachelor's degree in electrical engineering from the UCLA. So he he comes from a very, you know, patent law engineering type background, which I think actually helps in cases like this where it's so complex. So and I believe judge Saw comes from an intellectual property law background too. So, yeah, I think they're they're all very, you know, smart judges. But I think Chen and Stark are probably more skeptical of the government, and Hughes seemed to be more skeptical.
You know, was kinda skeptical of both sides.
Speaker A:
Well, I mean, I had the feeling that that justice Hughes was was working hard to understand the issue Yes. And, you know, make a decision accordingly. Yes.
Speaker B:
No. I think all both all 3 judges, I think, were trying to work hard on this and, you know, a area that is very complex. Mhmm. You know? And and just to say, you know, there are not a

lot of you know, in terms of judge Shen, there's not a lot of lawyers who have an engineering degree before they go to law school.
You know, that is you know, I think he yeah. He was the he was the the general counsel for the Pattern and Trademark Office. You know, a very, very complex area of law. So I think they're all working hard. I I think this could be a split decision.
You know, I would you know, I I No.
Speaker A:
No. Why do you say actually, before we get into that, I wanna ask you another question. 1 of the judge, I'm not sure which 1 it was, kept coming back to, you know, the idea of interpreting the expert understanding the expectations of the parties.
Speaker B:
Yes. That was judge Chen.
Speaker A:
Okay. Alright. So as a criterion for making this decision. Now, I mean, I it's I think it's perfectly obvious, okay, that that yes. Okay.
The expectations of the parties is obviously a huge issue here. What is your view of the government lawyer's response to that, the expectation of the parties?
Speaker B:
Well, I think in the Brouillier case, she's relying a lot on that the the technical explanation is a is a joint explanation that's signed off on by both Canada and The United States.
Speaker A:
How does the technical explanation help their position, though?
Speaker B:
That's but she I just remember I have in my notes. She went back to that several times.
Speaker A:
Yeah. I'm not sure that it really does.
Speaker B:
No. It doesn't.
Speaker A:
I mean, you know, to simply repeat in the technical explanation, you know, the language that's in the in the treaty, I I don't think really helps you in understanding what their understanding of that language is. Right?
Speaker B:
Yes. You know I mean,
Speaker A:
do you think that it is really conceivable that the authors of the technical explanation could have understand the language in accordance with the laws of The United States. You mean The United States can completely deny a foreign tax credit?

Speaker B:
No. That's not my you know, that isn't my belief.
Speaker A:
I mean, isn't isn't that really the single most important issue here? Because if you ask that question, could this have been understood or designed to allow The United States to simply randomly deny a foreign tax credit? I mean, could that possibly be imagined to be the expectation of both parties? In other words, Canada has to give a credit and The US will give a credit only if it wants to?
Speaker B:
Yes. Just to point out, I just did some some digging up here. The the government lawyer is a not a not a treaty or international law lawyer. So that probably has you know, that probably gives you an idea where she comes from.
Speaker A:
Well, I mean, I think that's that's very clear. Just Yeah. Just just listening to the argument. I don't I mean, I wouldn't say that she was overwhelmed, but I would say that that she really you know, she hadn't had a lot of experience arguing treaty cases for sure.
Speaker B:
No. Most treaties are what they call nonself executing. So they're simply binding on the the government, and then the governments, the parties, the treaty pass their own domestic law that actually makes the treaty and puts the treaty into force. Tax freeze, they're what they call self executing. So the actual treaty tax is the law that is enforceable.
So that's kind of even another level of of complexity in terms of
Speaker A:
Yeah. I mean, it doesn't yeah. That's right. I mean, you know, interestingly, the the these treaty provisions do not give rights to individuals. Right?
That that's
Speaker B:
Normally, do not. But for these, for for tax treaties, they do. They do give rights to individuals. Most
Speaker A:
Alright. Let let let's go back to let's go back to the the Christiansen thing now. Now the the lawyer for the taxpayers had very was not invited to speak very much, right, in that part. It was me lawyer. Right?
What are your tell me what your thoughts are on that. I mean, she first of all, was she comfortable with, you know, the argument? Like, what was she doing? Because, you know, this is at the point where she starts saying things that are flat out wrong. Right?
Speaker B:
She started seemed like she started to get very uncomfortable with the Christensen case.

Speaker A:
Yeah. But, I mean, that was Yes.
Speaker B:
You Yes. Know, which is why I I I I throw out you know, I think I make predictions. I I I throw out that possibility.
Speaker A:
Alright. Well, now let's talk about your prediction here in the last couple minutes here. I think it's Okay. Let's break it down. Let's break it down.
So the BREO issue is, not the same as the Chrissyton issue. Although the resolving the BREO issue in a certain way would determine Chrissyton's son. So the issue in BREO is in accordance with the laws of The United States, does that allow them to simply, you know, deny a foreign tax credit? Right?
Speaker B:
Yes.
Speaker A:
So what's the court gonna do with this?
Speaker B:
I think there's at least 2 judges that are are going to rule for the taxpayer.
Speaker A:
Maybe That's all we needed.
Speaker B:
And that's all you need. I I think there's at least 2 for the taxpayer, maybe all 3. For Christiansen, I think it's more likely to be all 3. I would be very surprised if
Speaker A:
Sorry. Sorry. Back up. Back up. So so on the thing, you think the court's gonna do what?
Speaker B:
I think the court will rule for the taxpayer, but I think maybe only by 2 only 2 votes, only 2 judges. But it could be 3.
Speaker A:
Okay. So, I mean, you know, if that happens I mean, you know, that that is an unbelievable victory that goes way beyond the net investment income tax. Right?
Speaker B:
Although it would
Speaker A:
be fair.
Speaker B:
Yeah. Although it would be fair, I think some of the the interest in this case, about the some of these corporate provisions, I feel like the government is already kind of acknowledging.

As I said, the the government is acknowledging the treaty can create rights for the taxpayer. It's just saying this particular right hasn't been created. That's not what a lot of people in, like, academia have been pushing intellectually.
So the government's actually already kinda given for for not for these other cases that kind of are waiting in ring wings, the government has already kinda thrown in the towel. This is a legal concept. You can't you can't make a legal argument in 1 case, and then the neck in another case, say, well, we're we're changing our mind, and we're gonna assert a different a different legal argument. So, you know, there's already been the government's already admitting some stuff to the advantage of the taxpayer that, again, a lot of these, you know, law tax law academics have actually been pushing back on. In terms of the Christensen case, I think that's more likely I mean, I would be very surprised if the government wins both cases at this point.
You know, anything can happen. But I'd be very surprised. It's you have 2 lower you have 2 lower court judges or judges of first and since both rule for the taxpayer in 2 different cases. You know, obviously, there's there's contradictions in their rulings, but I would be very surprised. I'd be very surprised if the taxpayer won on I mean, the government won in both cases.
Speaker A:
Would you be surprised that the taxpayer won on both? No.
Speaker B:
And I think if the if it's a split decision, that makes it more likely this goes to the supreme court.
Speaker A:
Well, that would really be something, wouldn't it?
Speaker B:
Which is that if if the government any ruling in this court is only gonna be bound by the court of federal claims. So, if if the if the court rules for the taxpayers and the government does not appeal and or the Supreme Court does not take the case, the government could still insist you have to pay this money. And then you you essentially have to pay it and then go to the court of federal claims for a refund. So even if the taxpayer wins and the government still wants to be difficult, you're gonna you know, there's gonna be a cost and expense for this for the taxpayer because this case is is not going through the tax court. It's not kinda going through the normal process of of binding tax.
It does mean that if you you if you're in a you can claim a refund, but most people would like to not have to pay a tax and then ask when to be refunded, which doesn't take time. So there's, you know, definitely a possibility if this if the taxpayer wins, and I said this case doesn't go forward to the Supreme Court, the government doesn't appeal or the Supreme

Court doesn't make the appeal, it's still the taxpayers taxpayers still are not in the greatest position.
Speaker A:
Yeah.
Speaker B:
Whereas if it did go all the way to the Supreme Court, that would be binding across the entire
Speaker A:
Well, do you would you imagine that the government's concern on this is not the net investment income tax, but rather the but rather the broader principle of, you know, the whole notion that they can't decree double taxation.
Speaker B:
Which is something that surprised me. It surprised me that they were not they kinda gave that argument up harshly by saying, yes. Treaties create individual rights for the taxpayer. It's just this treaty doesn't create this individual right. I thought they would make a broader argument against treaties generally, and they did not do that.
Speaker A:
Yeah. Yeah. Well, I, you know, I think I think it depends largely on who the lawyer is. Right? Yes.
I mean, I think, you know, a different lawyer might very well have. What do you think of my idea of recharacterizing these things as tariffs on foreign goods?
Speaker B:
I think there's a point to that. You know, there's a history, you know, the interest equalization tax, which comes out of you know, even the CFC rules were kind of you know, interest intro intro you mean, some of these 19 sixties tax laws, you know, the expatriation tax, 8 7 7, the intro interest equalization tax, which has long been repealed, but the CF subpart off all came out of an environment of protectionism. So there is a direct connection, of of discouraging Americans from investing outside The United States.
Speaker A:
You know what's really amazing about this? I mean, it's so obvious we haven't touched on it today. This net investment income tax is funding medical care for homeland Americans that Americans abroad can't even participate in. Yes.
Speaker B:
Yes.
Speaker A:
Yeah. I mean, it just you just you almost you just can't make this stuff up. Right? It's so unjust.
Speaker B:

Yes.
Speaker A:
I mean, paying the tax is bad enough, but being denied foreign tax credits is
Speaker B:
And that know, far That was 1 of the questions the judge has asked is is there anything in the legislative record that even says why this was put in this chapter 2 instead of just added into chapter 1? And the government lawyer basically said, no. There isn't anything. I mean, there's nothing there's no statements in, like, the congressional record that said, oh, we're gonna put this tax in chapter 2 instead of chapter 1 because we don't want people to have a foreign tax code. And my other belief is I would have to check.
Does this even go into the Medicare trust fund? I don't think it does. I think this just goes into, like, general revenue.
Speaker A:
So are you glad you made the effort? And by the way, thank you very much for making the effort to attend that. Yeah. You know, it was very good of you, and, you know, this has been your perceptions are are really, really interesting because, you know, you were there, etcetera. I mean, how do you feel about having invested a day and, I guess, a bit of money to get down there?
Good idea?
Speaker B:
Yeah. It was fine. It was quite interesting, you know, from the perspective that, you know, I've been following and working on this for, you know, 15 years.
Speaker A:
Well, I I think the community of Americans abroad owes you you know, owes you a great, you know well, guess the wrong word, but I I I think a certain amount of appreciation for that. Yeah. Yeah. Absolutely, which is great. Okay.
We've been on this for while. It's been a good conversation. Do you have any final thoughts before we start a call today for today? Or
Speaker B:
No. I'll just be very interested to see, you know, what the result is. You know, there's a part of me that I think probably the best thing for the taxpayer is for this to go to the Supreme Court. Because if it just ends here at at the court of, you know, federal claims, it's
Speaker A:
Well, if it goes to the Supreme Court, I mean, that's gonna
Speaker B:
Yeah. It's not gonna be full binding precedent throughout the country. That's in in
Speaker A:

I kinda know what I mean. It's gonna bring up the whole issue. Yes. It'll bring in the whole issue of of citizenship taxation generally. Yes.
Alright. So why don't we call here? This has been really, really good. And for listeners, I'm speaking with Tim Smith who Tim, you wanna add a little bit about yourself, where you live, you know, or your interest in this?
Speaker B:
Yeah. No. I live up in the Boston area and, you know, been working with John and on this issue now for, you know, 15 or so years. So not quite as active as I used to be, but, you know, always eager and ready to to help out with this.
Speaker A:
Absolutely. And and thank you again for for making that effort. Okay. So today is the 03/04/2026, the day after the live appeal in the Brea and Christiansen cases, and I have been getting a debrief. We're doing a debrief with Tim Smith.
So thank you very much.
Speaker B:
Thank you.
Speaker A:
Alright. We'll call it in here.

Chat

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